

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JORDY M.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2011040416

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on August 18, 2011, in Pomona, California.

Jordy M. (Claimant) was represented by his mother, Martha M. (mother).¹ Claimant attended the hearing. Claimant's sister, Claudia S. also attended the hearing.

Daniela Martinez, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Regional Center).

Oral and documentary evidence was received. The matter was submitted for decision at the conclusion of the hearing.

ISSUE

Should Claimant's eligibility for Regional Center services be terminated?

¹ Claimant and his mother and sister are identified by first name and last initial to protect their privacy.

FACTUAL FINDINGS

1. Claimant is an eight-year-old boy who lives with his mother and father, twin brother, Adrian, and his older sister, Claudia. Claimant was made eligible for Regional Center services on December 12, 2005 with a qualifying diagnosis of autism.

2. On March 30, 2011, Regional Center informed Claimant that he is no longer eligible for Regional Center services. Regional Center's decision was based on its determination that Claimant does not have autism, but rather, that he most likely suffers from a mixed receptive and expressive language disorder. Regional Center based its decision on the SGPRC Autism Clinic Assessment Report dated February 24, 2011. Claimant filed a timely appeal, and this hearing ensued.

3. Claimant was initially diagnosed with autism by Victor C. Sanchez, Ph.D. That evaluation was conducted to determine eligibility for Regional Center services as services under the California Early Intervention Services Act² were terminating because Claimant was reaching the age of three. At that time, Dr. Sanchez described numerous repetitive and stereotypical behaviors as reported by mother. During free play activities, Dr. Sanchez observed Claimant to engage in perseverative behaviors, which mother stated also occurred at home. Claimant was not always responsive to efforts to assess him. He was somewhat aloof and although he made eye contact, he did not always maintain it for very long. During the assessment, Claimant participated in some activities and ignored or refused to engage in others. Cognitively, Claimant obtained scores in the low average range, although Dr. Sanchez thought this might be at least a mild underestimation of his actual abilities. Dr. Sanchez was only able to administer the performance sub-tests from the Wechsler Preschool and Primary Scale of Intelligence-III (WPPSI – III) due to Claimant's disinterest in other sub-test materials. Dr. Sanchez also noted that Claimant was not willing to do the Peabody Picture Vocabulary Test, a test of receptive language. Claimant received an age-appropriate score on the Visual-Motor Integration Scales. Dr. Sanchez stated that Claimant's adaptive skills were in the low average range with the more obvious deficits in communication and social skills.

4. Dr. Sanchez concluded that Claimant presents with symptoms that indicate the likely presence of autism as that term is used in the Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition, Text Revision) (DSM-IV-TR). On the Gilliam Autism Rating Scale 2 (GARS-2), Claimant's scores fell in a range consistent with autism. Dr. Sanchez recommended that Claimant be reevaluated when it is more likely Claimant would be amenable to working with assessment instruments. Dr. Sanchez stated that "it would be very important for the evaluating psychologist to have available any descriptive dat[a] from teachers or therapists who will be working with [Claimant]. There are some elements in his presentation which suggest the possibility that [Claimant's] symptoms might diminish - given their relatively mild level at present."

² Government Code section 95000 et seq.

2011 SGPRC Autism Clinic Assessment Report

5. On February 24, 2011, the SGPRC Autism Clinic completed an assessment report (Assessment) for purposed of clarifying Claimant's diagnosis and determining continued eligibility for Regional Center services. The Assessment was signed by Deborah Langenbacher, Ph.D., Judith Aguilera, M.A., CCC-SLP³ and Larry Yi, M.D. (individually the evaluator and collectively the Assessment Team). The Assessment Team determined that Claimant does not meet the criteria for autism, but that Claimant does have significant delays in his receptive and expressive communication which interferes with his academic and social functioning. The Assessment diagnosed Claimant with a Mixed Receptive Expressive Language disorder (DSM-IV-TR315.32) which is quite severe. The Assessment Team considered the following sources of information "parent interview; play observation; Autism Diagnostic Observation Schedule, Module 3 (ADOS); Wechsler Nonverbal Intelligence Scale (WMV), Adaptive Behavior Scale – II (ABAS – II); and records review. The only record specifically identified in the Assessment as having been reviewed is Dr. Sanchez' 2005 report. The Assessment states that no reports were available from Claimant's school district; although Regional Center offered as evidence Claimant's 2009 triennial report prepared by the Azusa Unified School District (District). There is reference in the Assessment to Claimant's Individualized Education Program (IEP), and various aspects of Claimant's educational services, but the IEP was not offered as evidence by Regional Center or Claimant. There is no evidence that Regional Center considered any information from Claimant's teachers or therapists as strongly recommended by Dr. Sanchez or that any observation of Claimant was made in school, in his home or in a location where he was observed with other children. Nor does the Assessment Team explain why it did not obtain such information or engage in such observation. Mother believes that the evaluators may have not had a true picture of Claimant because the assessment was conducted in the morning, after Claimant had taken Abilify, a medication which calms him down. The Assessment Team noted mother's concern but believed it had obtained an accurate assessment of Claimant.

6. In concluding that Claimant does not meet the criteria for autism, one Regional Center evaluator noted that Claimant was able to engage in joint interactive play with the evaluator. He was described, however, as having difficulty describing his own emotions and discussing friendships. He did not use atypical language but offered minimal information without prompting. He was able to respond appropriately to the evaluator and make eye contact and establish good overall rapport. He did not demonstrate stereotypical, ritualistic behaviors or restricted interests. The evaluator attributed Claimant's limited expressed insights regarding social relationships to his limited language ability rather than a lack of true understanding. Regional Center attributed Claimant's ADOS score, which was just below the cut off for autism to his verbal communication deficits.

³ A CCC-SLP is a Certificate of Clinical Competency-Speech-Language Pathology.

7. During the medical portion of the assessment, parents expressed concerns about Claimant's lack of independence in activities of daily living. Claimant requires step by step prompting for dressing, bathing and toileting hygiene. Mother reported that Claimant will greet and interact with familiar adults, but then leaves them and makes inappropriate announcement. With unfamiliar adults, Claimant may interact and then "study them." Mother reports Claimant primarily plays with his brother, but will try to converse or interact when approached by another child. Mother described Claimant as a perfectionist who has difficulty with transitions and adherence to specific routines. Mother reported a history of sleeping problems and that Claimant will awaken twice during the night. Claimant is fearful of darkness and shadows, and becomes anxious when thinking about his older sister leaving home. Claimant is also afraid of loud noises. Claimant was observed to be active and alert during the evaluation. He had some difficulty comprehending questions and his responses were off topic. He engaged in good imaginative play and social reciprocity, although he tended to focus on parts of toys and was observed to line them up. Claimant's adaptive skills were assessed using the ABAS – II. With mother as informant, the evaluator reported that Claimant has significant delays in all adaptive skill areas but with relative strength in functional academics.

8. Claimant's receptive and expressive language was found to be markedly impaired. Claimant's pragmatic language seemed to be much more appropriate. He was able to appropriately engage the evaluator in a variety of ways, including taking turns, maintaining a short dialogue and maintaining relatively good eye contact and body distance.

2009 and 2010 Triennial Evaluations Conducted by District

9. Claimant's 2009 and 2011 Triennial Psycho-Educational Team Assessments prepared by District were received into evidence (2009 Triennial and 2011 Triennial respectively). The 2009 Triennial concluded that Claimant was eligible for special education services based on specific learning disability, autism-like disorder and speech and language disorder. Autism-like characteristics included an inability to use oral language for appropriate communication, a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood, an obsession to maintain sameness, extreme preoccupation with objects or inappropriate use of objects or both, and self-stimulating, ritualistic behavior. The definition of autism for the purpose of eligibility for special education services differs from the definition of autism for purposes of eligibility for regional center services.

10. The 2011 Triennial, which was completed in June 2011, after the Assessment, concluded that Claimant was eligible for special education based on a specific learning disability, autistic-like behaviors and speech and language disorder. As part of the 2011 Triennial assessment, Claimant's current teacher reported that Claimant has sensory difficulties and that he becomes agitated and upset by loud noise in the classroom. The teacher also reports Claimant has difficulty understanding and processing facial expressions and body language from peers. The Basic Assessment for Children – 2 (BASC-2) was scored by both parent and teacher. The BASC-2 measures a child's adaptive and problem-

solving behaviors in a variety of settings. Both rated Claimant as being either having clinically significant maladjustment or being at risk of maladjustment in several areas. The GARS-2 was also administered during the 2011 Triennial assessment using both parent interview and teacher ratings. Parent rated Claimant with a 96 autism quotient, indicating that he very likely meets the criteria for autism. Teacher rated Claimant with an autism quotient of 72, indicating that Claimant possibly meets the criteria of autism.

11. A letter dated April 28, 2011 from Claimant's first and second grade special day class teacher was received into evidence. Claimant's teacher describes Claimant becoming upset on an almost daily basis during the 2010-2011 school year. Claimant is upset by the noise level in the classroom, other children's facial expressions or actions, occasionally "spooky" stories, or the weather. The teacher also describes the regular occurrence of angry explosions including jumping and shouting, pushing things over, flinging papers off the desk, running to the door, running and hugging his brother who is in the same classroom and hiding behind furniture.

12. Letters dated February 23, 2011 and March 6, 2011, from Charles E. Imbus, M.D., a neurologist treating Claimant were received into evidence. These letters give a diagnosis of autism, briefly describing Claimant's "self-stim behavior particularly when he is either extreme of happiness or being upset." Doctor Imbus also describes both observed and parent reports of Claimant's aversion to loud noises, his limited peer friendship, his dislike of food textures and desire to eat only carbohydrates, his problems with hygiene, his limited eye contact, insomnia, headaches and various other problems. Doctor Imbus does not identify any tests or rating scales he used in determining that Claimant suffers from autism. Doctor Imbus confirms efforts to treat Claimant with Abilify.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)⁴
2. Under the Lanterman Act, regional centers are charged with carrying out the state's responsibilities to the developmentally disabled. (§ 4620, subd. (a).)
3. The Regional Center bears the burden of proving that the initial determination that Claimant was and is eligible for services under the Lanterman Act was "clearly erroneous." (§ 4643.5, subd. (b); Evid. Code, § 500.)
4. Section 4512, subdivision (a) states:

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to

⁴ All further references are to the Welfare and Institutions Code unless otherwise noted.

continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly referred to as Fifth Category], but shall not include other handicapping conditions that are solely physical in nature.

5. California Code of Regulations, title 17, section 54000 states:
 - (a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
 - (b) The Developmental Disability shall:
 - (1) Originate before age eighteen;
 - (2) Be likely to continue indefinitely;
 - (3) Constitute a substantial disability for the individual as defined in the article.
 - (c) Developmental Disability shall not include handicapping conditions that are:
 - (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.
 - (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

6. “Substantial disability” means “the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person” in the following categories: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency. (§ 4512, subd (l).)

7. The DSM-IV-TR lists criteria which must be met to provide a specific diagnosis of an Autistic Disorder, as follows:

A. A total of six (or more) items from [paragraphs] (1), (2), and (3), with at least two from [paragraph] (1), and one each from [paragraphs] (2) and (3):

(1) Qualitative impairment in social interaction, as manifested by at least two of the following:

(a) Marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction;

(b) failure to develop peer relationships appropriate to developmental level;

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);

(d) lack of social or emotional reciprocity.

(2) Qualitative impairments in communication as manifested by at least one of the following:

(a) Delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);

(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;

(c) stereotyped and repetitive use of language or idiosyncratic language;

(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

(3) Restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:

(a) Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;

(b) apparently inflexible adherence to specific, nonfunctional routines or rituals;

(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);

(d) persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

8. Section 4643.5, subdivision (b) provides: "An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from the regional center unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous."

9. In light of Factual Findings 1 through 12 and Legal Conclusions 1 through 7, the 2005 Regional Center determination that Claimant is eligible for Regional Center services on the basis of autism was not clearly erroneous. The “clearly erroneous” standard is a high standard imposed on the Regional Center because it is trying to change previous findings upon which Claimant has relied.

While both the Regional Center Assessment Team and Claimant’s psycho-educational assessment support the conclusion that Claimant suffers from a severe language disorder, there is insufficient evidence in the record to support the conclusion of the Assessment Team that his language disorder explains Claimant’s impaired social and academic functioning. Dr. Sanchez found Claimant has autism, albeit in a mild form. On the ADOS module 3, administered as part of the Assessment, Claimant scored a 7, just below the cut off for having autism spectrum disorder. On the GARS-2 administered during the 2011 Triennial, Claimant received a score of 96, (very likely for autism) on the parent rating scale and a score of 72 (possibly) on the teacher rating scale. These scores are not so dissimilar from the mild form of autism found by Dr. Sanchez so as to render his conclusion clearly erroneous.

Moreover, the Assessment Team does not assert that a diagnosis of autism is mutually exclusive of a diagnosis of mixed receptive expressive language disorder. Nor has the Assessment Team articulated how the existence of a language disorder explains Claimant’s autistic features. Of concern is the fact that the Assessment Team did not consider any descriptive data from teachers or therapists working with Claimant, which was specifically recommended by Dr. Sanchez at the time of the original diagnosis. Although the Assessment referenced Claimant’s IEP, the Assessment states that no reports were available from Claimant’s school. There is no evidence that the District attempted to obtain any information from District regarding Claimant’s functioning, or to observe Claimant in school or other setting with children present.⁵ Mother indicated that Claimant is currently in therapy with a mental health team and that she expects to receive a diagnosis for them in several months. This information may shed more light on the appropriate diagnosis and suggest how to proceed to provide Claimant with appropriate services. In the meantime, Claimant continues to be eligible for Regional Center on the basis of autism.

⁵ Regional Center offered the 2009 Triennial report into evidence but there is no reference to it in the Assessment. The 2009 IEP is referenced in the Assessment, but it was not offered into evidence. The 2009 Triennial also includes a notation that a supplemental report will be provided by Claimant’s classroom teacher and attached to the evaluation. No such report was offered into evidence. Mother placed the 2011 Triennial psycho-educational evaluation into evidence without objection from the Regional Center, although it had not been completed at the time of the Assessment.

ORDER

Claimant's appeal of Regional Center's determination that Claimant is not eligible for services is granted. Regional Center may not terminate Claimant's eligibility.

Dated: September 2, 2011

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.